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Supreme Court, U.S.
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No. 01-1062

In The

Supreme Court of The United States

RUSTY ROBERTS, ET AL
Petitioners

v.

CARDINAL SERVICES, INC., ET AL
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In determining seaman status under the Jones Act, 46 U.S.C. § 688, does the 30% guideline for determining substantial duration as annunciated in *Chandris* apply to an identifiable group of vessels which are subject to common ownership or control?

INTERESTED PARTIES

The following persons and entities were parties below and have an interest in the outcome of this case:

Cardinal Services, Inc.

Superior Energy Services, L.L.C.

Sandy Roberts and Rusty Roberts, individually and on behalf of their minor children, Chase and Jarod Roberts.

Kerr-McGee Corporation, Oryx Energy Company successor in interest, was a defendant in the District Court and Appellee in the Court of Appeal but has no interest in the matters addressed in the Petition for Writ of Certiorari.

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Respondent, Superior Energy Services, L.L.C., is affiliated with the following corporation:

Superior Energy Services Corporation

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 266 F.3d 368 (5th Cir. 2001) and is reproduced at Appendix A-1a to the Petition for Writ of Certiorari. The District Court for the Eastern District of Louisiana opinion appears at 2000 W.L. 1560045 (E.D. La.) and is reproduced at Appendix B-38a to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals was rendered on October 2, 2001. There was no application for rehearing. Jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1) and § 2101(c).

STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. § 688, provides in relevant part:

> "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury..., and in such action, all statutes of the United States, modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

STATEMENT OF THE CASE

Petitioner, Rusty Roberts, was employed by Cardinal Services, Inc. n/k/a Superior Energy Services, L.L.C. for approximately nineteen (19) months.[1] Mr. Roberts was hired as a plug and abandonment helper and was later promoted to a plug and abandonment operator.[2] Cardinal provides a wide range of oilfield services to the energy industry in Louisiana and Texas as well as in the Gulf of Mexico offshore those states.[3] Cardinal's services are performed on land and on fixed platforms in the Gulf of Mexico.

Plug and abandonment (P&A) work is not limited to wells offshore but is also performed on land-based oil and gas wells once it is determined the wells are to be decommissioned. Petitioner's statement, "Since there are no mud lines or such bodies of water on land, this work is necessarily entirely maritime in nature..."[4] is not correct and is not supported by the lower court record.

During Mr. Roberts' nineteen (19) month employment, Mr. Roberts' job location was customer driven. The majority of Mr. Roberts' employment (58.69% of his entire employment with Cardinal) was spent strictly in connection with work on wellheads on platforms where no vessel was involved or in work on

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[1] Cardinal Services, Inc. merged with Superior Energy Services, L.L.C. while this matter was in litigation. The Respondent will hereinafter be referred to as "Cardinal."

[2] Many of the facts contained in Petitioner's Petition for Writ of Certiorari are not accurate and not supported by the lower court record. Respondent addresses these inaccuracies and refers the Court to the Findings of Fact as stated in the Fifth Circuit's Opinion, *Roberts, et al v. Cardinal Services, Inc., et al*, 266 F.3d 368, 371-373.

[3] *Roberts, et al v. Cardinal Services, Inc., et al*, 266 F.3d, 368, 371.

[4] *Roberts*, Petition for Writ of Certiorari at 4, (No. 01-1062).

land in the Cardinal shop or yard. (Tr.R. 945, 954, 958, 968-1606). The Cardinal Daily Operation Reports which were produced, identified and made part of the record below, describe and account for every hour of Mr. Roberts' employment as a Cardinal plug and abandonment helper and operator, which describes Mr. Roberts' employment with Cardinal as performing P&A work to *oil* and *gas wells*, not vessels. (Tr.R. 941-1606).

On those occasions where Mr. Roberts worked other than on a fixed platform where no vessel was involved or in the Cardinal shop or yard, he still performed strictly P&A operator duties and never worked as a crew member of any vessel. (Tr.R. 857, 864, 877, 880, 881, 913, 932. 938(b), 939). Petitioner ignores the substantial time Mr. Roberts spent working on land, in the shop and on fixed platforms with no liftboat involved on the job. Furthermore, reference to Mr. Roberts as an "offshore construction worker" is inaccurate. It was undisputed in the lower court that the work of P&A employees was to shut down and plug oil and gas wells. (Tr.R. 838, 880, 912(b), 913, 916).

Mr. Roberts spent 21.45 percent of his time in a shop on land, 37.24 percent of his time performing P&A work on platforms with no vessel involvement, 13.54 percent of his time performing P&A work on platforms with third-party vessels alongside, 24.88 percent of his time performing P&A work on platforms with a Cardinal liftboat alongside, 1.99 percent of his time in transit on Cardinal vessels, and .9 percent of this time performing P&A work on the CARDINAL 1, a Cardinal-owned vessel.[5]

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[5] *Id.* at 266 F.3d at 376.

If there was a need for living quarters with food services or additional space on a well site for equipment, the Cardinal P&A department or its customer would make arrangements for a lift boat to be used. (Tr.R. 912(b)). Whether a Cardinal lift boat or a third party lift boat was used on a job was determined by the needs of the customer and not by any particular Cardinal policy. Petitioner's argument that Cardinal had a "change in the employer's method of working" by using its own vessels, as opposed to third party vessels, is *non sequitur*. This does not create a "new assignment" for Mr. Roberts as his duties as a P&A employee never changed during his entire tenure with Cardinal. (Tr.R. 880, 912(b) and 913.

If a lift boat was used, it would be jacked up adjacent to the platform and would remain stationary until the P&A job was completed. (Tr.R. 936(b)). On each of those occasions, the lift boat had its own marine crew, which was completely separate and apart from the plug and abandonment crew, which Mr. Roberts was assigned. (Tr.R. 938(b), 939). Furthermore, this argument was never raised in the lower court or to the Fifth Circuit nor is there any evidence in the record to support this contention.

PROCEEDINGS BELOW

The district court granted Cardinal's Motion for Summary Judgment "because the evidence clearly proves that Mr. Roberts had an inadequate temporal connection to a vessel" and is not a seaman under the Jones Act.[6] The Fifth Circuit Court of Appeals affirmed the district court's grant of summary judgment and held "when a group of vessels is at issue, a worker who aspires to seaman status must

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[6] *Roberts, et al v. Cardinal, et al*, 2000 W.L. 1560045 *2 (E.D. La.).

show at least 30 percent of his time was spent on vessels, everyone of which was under his defendant-employer's common ownership or control."[7]

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. No Conflict with the United States Supreme Court

Review of the Fifth Circuit's decision discloses the Fifth Circuit properly relied upon and quoted the jurisprudence of this Honorable Court as stated in *Papai*[8], *Chandris*[9] and *Wilander.*[10] Petitioner's argument would have this Court overlook or disregard entirely the requirement of a substantial connection to a vessel or identifiable fleet of vessels for Jones Act seaman status. Clearly, this is not the law or the appropriate standard. The Fifth Circuit's ruling should be affirmed as being based on the proper legal test announced by this Court.

The inquiry in determining seaman status for Jones Act purposes as stated by the Fifth Circuit and as set forth by this Court in *Chandris* is as follows:

> First,...an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission.'... Second, and most important for our purpose here, a seaman must have a connection to a vessel in navigation (or to an

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[7] *Roberts*, 266 F.3d at 377.

[8] *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548, 117 S.Ct. 1535 (1997).

[9] *Chandris, Inc., et al v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172 (1995).

[10] *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, (1991).

> identifiable group of such vessels) that is substantial in terms of both its duration and nature.[11]

The Fifth Circuit in *Roberts* then set forth the purpose of the test stated by this Court in *Chandris* and reaffirmed in *Papai* is to:

> Separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.[12]

The Fifth Circuit in *Roberts* explained and followed this Court's instruction in *Chandris* determining whether a worker's connection to a vessel is substantial in duration: "A worker who spends less than 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."[13]

This Court has not indicated that the 30 percent threshold for determining substantial temporal connection should not be applied regardless of whether a worker has connection with one vessel or several vessels. The Fifth Circuit explained that the "30 percent floor does not change when an 'identifiable group' of vessels in navigation is at issue, rather than just one vessel."[14] As indicated by the Fifth Circuit,

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[11] *Roberts*, 266 F.3d at 374 quoting *Chandris*, 515 U.S. at 355-56.
[12] *Id.* at 374, quoting *Chandris*, 515 U.S. at 368; see also *Papai*, 520 U.S. at 560; *Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340, 346 (5th Cir. 1999).
[13] *Id.* at 375, quoting *Chandris*, 515 U.S. at 368.
[14] *Id.* at 375.

this Court has given the following instruction on how to determine if there is an identifiable group of vessels:

> In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman-status determination, the question is whether the vessels are subject to common ownership or control.[15]

Petitioner has not indicated how the Fifth Circuit's opinion conflicts with any decision by this Court. The Fifth Circuit was correct in determining that when a "group of vessels is at issue, a worker who aspires to seaman status must show that at least 30 percent of his time was spent on vessels, every one of which was under his defendant-employer's common ownership or control."[16]

Unlike the suggestion of the Petitioner, the Fifth Circuit acknowledged and correctly explained why a departure from the Court's 30 percent guideline as allowed in *Chandris* would not be justified in this instance.[17] In *Wisner v. Professional Divers of New Orleans*,[18] the Louisiana Supreme Court reversed a grant of summary judgment against a commercial diver even though he did not have a substantial connection to a fleet under common ownership or control because the diver 'faced regular exposure to the perils of the sea.'[19] Contrary to the Petitioner's

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[15] *Id.* at 376, citing *Papai*, 520 U.S. at 556-557, quoting *Chandris*, 515 U.S. at 366, (emphasis added) (internal citations omitted).
[16] *Roberts*, 266 F.3d at 377.
[17] *Id.* at 377-378.
[18] *Wisner v. Professional Divers of New Orleans*, 731 So.2d 200 (La. 1999).
[19] *Roberts*, 266 F.3d at 377 quoting *Wisner*, 731 So.2d at 202.

position, "perils of the sea" or seaman's risk is not outcome determinative of seaman status.[20]

The Fifth Circuit reasoned:

> Even though a professional diver is peculiarly- and totally-subject to the perils of the sea and thus may, under special circumstances, qualify as a seaman without showing the requisite degree of temporal connection, a p&a crewman, who practices 'an art developed in land work and transposed to a maritime setting,' cannot.[21]

There is no conflict with this Court's precedent with the Fifth Circuit's refusal to depart from the requirement of a worker having a substantial connection to a fleet under common ownership or control when the worker does not perform traditional maritime activities which subject him to the perils of the sea.

B. No Conflict with Other Circuits

The Petitioner alleges the Fifth Circuit opinion is in conflict with Third Circuit, Second Circuit and the Louisiana Supreme Court "by its unwavering insistence on the application of the thirty percent test as the minimum time having been spent on employer owned vessels without analysis of the entire circumstances of the employment of the putative seaman, here petitioner."[22] Petitioner does not give any analysis explaining how a conflict exists between

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[20] *Chandris*, 515 U.S. at 361-362.
[21] *Roberts*, 266 F.3d at 378.
[22] *Roberts*, Petition for Writ of Certiorari at 5, (No. 01-1062).

the Fifth, Third and Second Circuits, but rather simply cites two cases.

Petitioner refers to the Third Circuit Court of Appeals decision in *Shade v. Great Lakes Dredge and Dock Co.*, 154 F.3d. 143 (3rd Cir. 1998) for the proposition that this case is in conflict with the Fifth Circuit decision in *Roberts*. In *Shade*, an injured employee sued his employer, Great Lakes Dredge and Dock Co., a dredging contractor, for damages under the Jones Act. Great Lakes had previously employed Shade from September 1992 until February 1994. Beginning in March, 1994 Shade worked for Bean-Weeks Joint Venture, another dredging contractor, as a deckhand. Bean-Weeks subsequently fired Shade and he remained without work until Great Lakes rehired him in December, 1994 and was subsequently injured.[23]

The Third Circuit articulated the issue as follows:

> "Thus, in this unusual situation, we must determine whether the fleet seaman doctrine permits Shade to aggregate his prior assignment with Great Lakes and his work for the company at the Cape May job to establish a substantial connection to a vessel in navigation even though he was not employed continuously by Great Lakes."[24]

The Third Circuit in *Shade* referred to the jurisprudence set by this Court in *Papai*. In *Papai*, prior assignments could not be used to establish seaman status because they were separate from

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[23] *Shade*, 154 F.3d at 145-146.
[24] *Id.* at 152-153.

Papai's present employment. Contrary to the Petitioner's suggestion, the Third Circuit referred to the Fifth Circuit Court of Appeals decision in *Patten-Tulley Transp. Co. v. Ratliff*, 797 F.2d 206 (5th Cir. 1986), wherein the Fifth Circuit upheld the exclusion of evidence of a prior employment with the same employer because the employee had not worked with the employer on a continuous basis.[25]

The *Shade* Court held that evidence of an employee's prior assignment with the same employer is not admissible under the fleet seaman doctrine if those assignments were not part of a continuous employment relationship between the employee and employer.[26] The Second Circuit stated that "even though the fleet seaman doctrine permits an employee to aggregate contacts with multiple vessels, it is clear that these contacts must have occurred with vessels owned or controlled by the same employer."[27]

Petitioner has also referenced there is a conflict with the Second Circuit Court of Appeals in *Fisher v. Nichols*, 81 F.3d 319 (2nd Cir. 1996). The facts surrounding the plaintiff in *Fisher* are entirely distinguishable from the facts in Petitioner's case. In *Fisher*, Fisher was employed for one day to carry out functions designed to effectively sail a vessel during a race. The question before the Second Circuit was articulated as follows:

> Whether his (Fisher) regular sea-based employment coupled with the work he was performing when the accident occurred, vests him with 'seaman' status or whether, as Nichols

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[25] *Id.* at 153.
[26] *Id.* at 153.
[27] *Id.* at 151.

> (employer) argues, we are confined in our analysis of Fisher's sea-based employment only to Fisher's connection with Nichols's yacht.[28]

The Second Circuit considered all of Mr. Fisher's previous sea-related activities and not just those pertaining to his employment with the employer at the time of his accident. In interpreting *Chandris*, the Second Circuit held it is not required that a Jones Act plaintiff "must necessarily have a substantial connection to a particular vessel owned by that employer or to a group of vessels under common ownership or control of that employer."[29]

The *Fisher* decision was decided prior to this Court's decision in *Papai*. As previously discussed, in *Papai*, this Honorable Court has instructed that if there is an identifiable group of vessels the question is whether the vessel is subject of common ownership or control.[30] This Court's ruling in *Papai* dispels any notion that there might be a conflict with the Second Court's ruling in *Fisher* and the Fifth Circuit.

Additionally, the Second Circuit's decision in *Fisher* is distinguishable from the *Roberts'* decision, as there was not any evidence of any other employment to be considered in deciding whether Mr. Roberts was a Jones Act employee.

C. No Confusion Or Lack of Uniformity in Interpreting this Issue Under the Jones Act

The Fifth Circuit in *Roberts* was clear and consistent within the guidance given by this Court in

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[28] *Fisher v. Nichols*, 81 F.3d 319, 322 (parenthesis added).
[29] *Id.* at 323.
[30] *Papai*, 520 U.S. at 556-557; quoting *Chandris*, 515 U.S. at 366.

Papai, *Chandris* and *Wilander*. As pointed out by the Petitioner in *Chandris*:

> The Court's 'strong concern for uniformity' in admiralty law, *Moragne*, 398 U.S. at 401, is directed at maintaining the smooth flow of maritime commerce by ensuring that 'all vessel operators are subject to the same duties and liabilities.' *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 676 (1982). This Court granted certiorari in other areas of maritime law where the legal principles were either outdated or subject to conflicting interpretations by the circuit courts. *Howlett v. Birkdale Shipping Co. S.A.*, __U.S.__, 114 S.Ct. 2057 (1994); *Wilander*, 498 U.S. 337; *Scindia Steam Navigation Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981); *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1995).[31]

In Petitioner's case, there is not a true conflict with any circuit and the Fifth Circuit decision does not conflict with the relevant decisions of this Court.

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[31] Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd., Petition for Writ of Certiorari at 16 (No. 94-325).

CONCLUSION

For the foregoing reasons, Petitioner's request for Writ of Certiorari should be denied.

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